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## Chapter 4 Limited Access

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## **4.1 Background**

On July 28, 1995 (60 FR 38785), NMFS published an Advanced Notice of Proposed Rulemaking (ANPR) of its intent to implement a limited access program for the commercial Atlantic swordfish and Atlantic shark fisheries. An Issues and Options Paper (July 1995) was developed and NMFS convened workshops (December 1995) to gain public input on the design and objectives of such a system.

On December 27, 1996 (61 FR 68202), NMFS published a proposed rule to implement limited access in the Atlantic shark fishery. On February 26, 1997 (62 FR 8672), NMFS both published the proposed rule to implement limited access in the Atlantic swordfish fishery and, due to public requests to consider the two proposals simultaneously, extended the comment period on the proposed rule for Atlantic sharks to coincide with that for Atlantic swordfish. The comment period for both proposed rules ended April 28, 1997. Twenty-three public hearings were conducted from Maine to Texas, including the Caribbean.

As stated in these proposed rules, the goal of limited access in the Atlantic swordfish and shark fisheries is to begin to rationalize current harvesting capacity with the available quota, and reduce latent effort without significantly affecting the livelihoods of those who are substantially dependent on the fisheries (in other words, to prevent further overcapitalization). This limited access system does not directly reduce fishing mortality in these fisheries but does complement other measures in this FMP.

Since the publication of these proposed rules, a number of concerns were raised by the public and the HMS Advisory Panel (AP) regarding the implementation of limited access in the Atlantic swordfish and shark fisheries. These concerns included the length of time since the close of the comment period and the formation of the HMS AP. NMFS had additional concerns including the magnitude of changes from the proposed rule being considered, the magnitude of changes in the swordfish and shark fisheries, and concern over the classification (significance or non-significance under the Regulatory Flexibility Act and Executive Order 12866) if dates and time periods were not updated. For these reasons, NMFS decided to re-propose limited access in the Atlantic swordfish and shark fisheries in the draft HMS FMP (63 FR 57093). Based on the comments received during the comment period on the draft HMS FMP and its proposed rule (64 FR 3154), NMFS has decided to implement limited access in the Atlantic swordfish and shark fisheries and place a permit restriction on vessels fishing for bigeye, albacore, yellowfin, and skipjack (BAYS) tuna in the longline category.

## **4.2 Purpose and Need for Action**

### *Excess Number of Commercial Vessels*

Any reductions in quotas will exacerbate an existing problem that is already severe in both the commercial Atlantic swordfish and shark fisheries: a mismatch of harvest capacity and resource productivity. In the Atlantic swordfish commercial fishery, approximately 300 vessels land at least one swordfish each year. While the individual vessels participating in the swordfish fishery may change from year to year, this active fleet size has remained relatively constant since

1987. However, the number of permitted vessels increased from between 600 and 800 in the early 1990s to just under 1,200 in 1995. Since then, the number of permits issued has declined slightly to approximately 1,000 in 1997. This slight decrease in permit holders may be due to the exiting of some larger vessels. However, the number of permitted vessels is still far in excess of the number of vessels actually active in the fleet. The Atlantic commercial shark fishery has a similar problem. In 1996, there were approximately 2,257 shark permit holders; however, mandatory logbook data indicate that only about 565 vessels reported landing at least one large coastal shark. Additional permit holders reported landing pelagic or small coastal sharks. These percentages of active and inactive shark permit holders were approximately the same in 1995 with only 25 percent of permit holders landing a large coastal shark. However, only 352 of the active permit holders in 1995 were also active in 1996, indicating considerable ingress and egress in this fishery.

This large reserve of inactive permits, or latent effort, in both fisheries represents a substantial potential for increased harvesting capacity that could intensify the derby fishing conditions that already exist. As progressively more Atlantic, Gulf, and Caribbean federal fisheries come under limited access provisions or more restrictive regulations, there will be progressively more pressure put on those fisheries that remain open access. There is already evidence that vessels are spilling over from other fisheries and that many fishermen are attempting to enhance their future security by developing a catch history in alternative fisheries.

There are many problems associated with open access fisheries. The greater the number of fishing vessels participating, the more likely it is that individual fishing enterprises will become unprofitable or marginal. This need to produce a profit can lead to greater pressure to catch fish faster. The resulting “race for the fish” or derby fishery produces market gluts, poor product quality, safety concerns, and may exacerbate bycatch problems. Shortened fishing seasons also mean that fresh fish may not be available to processors and consumers for prolonged periods or U.S. swordfish fishermen may lose their year-round market niche. Also, minimizing the derby fishery should allow the fishery as a whole to become more economically-viable.

#### *Rationale for Limited Access*

Limited access is an important first step towards rationalization of fisheries. A permit limitation program restricts access to a fishery by limiting the number of vessels allowed to harvest the resource. Assuming sufficient restrictions on the ability to gain a license and a provision to make the licenses transferable, rent generated by the fishery resource is reflected in the value of the license. If the initial licenses are provided to the fishermen at no cost, they may receive a benefit when they exit the fishery by selling their license to the new entrants (refer to Appendix A to the Amendment 8 to the Reef Fish Fishery Management Plan, Gulf of Mexico Fishery Management Council, Tampa, FL). The license becomes a barrier to entry, and only the most efficient new entrants will be able to purchase a license and survive in the fishery. If the group of licensed fishermen is sufficiently small and communication costs are minimal, then the fishermen may cooperate to conserve the resource and increase their collective incomes (Muse, 1991). Fishermen can be expected to have more difficulty communicating if they are geographically spread out or if they have conflicting cultural differences. In such cases, they will still tend to behave as if the fishery is an open access resource even if there are a reduced number

of fishermen. Once limited access is fully implemented, NMFS will consider a buyback program to further match the fishing capacity to the available quota, and to reduce fishing effort.

Limited access is expected to have several benefits associated with an economically-viable fishing fleet. Some positive benefits of limited access may include, but are not limited to, the following:

1. fishermen who make fewer risk-prone decisions, such as decisions to fish in adverse weather or to overload fishing vessels (NS 10);
2. a better defined universe of permit holders for education workshops, outreach programs, and potentially increased communication between fishermen and managers (NS 2);
3. fishermen who take more care deploying and retrieving gear and releasing bycatch, thus resulting in higher product quality, reduced bycatch and bycatch mortality, and less lost gear that may continue to “ghost fish” (NS 9);
4. fishermen who spend more time seeking out fishing grounds with lower bycatch rates and/or less overcrowding (NS 9, 10);
5. fishermen who have less incentive to circumvent regulations;
6. better record keeping and higher accuracy of reporting (NS 2);
7. increased efficiency of enforcement; and
8. preservation of the historically small owner/operator nature of these fisheries and their associated communities (NS 8).

Additionally, to the extent that open access in the swordfish and shark fisheries contributes to derby fishing conditions, fishermen may fish in inshore areas in order to minimize transit time from fishing grounds to offloading sites. Fishing in inshore areas where immature swordfish and sharks predominate can have several negative ecological ramifications including higher catches of immature fish and associated higher effective fishing mortality rates, increased bycatch rates of undersized fish if a minimum size is implemented, and higher fishing effort (with increases in bycatch of immature fish) because more small fish than large fish must be caught to reach the same weight-based commercial retention limit or quota. To the extent that this limited access system decreases derby fishing conditions, catches of immature fish may also decrease as fishermen fish further offshore where larger fish predominate.

Historically, management measures have treated both the commercial Atlantic swordfish and shark fisheries as common property resources and have been primarily directed at controlling the amount of harvest rather than correcting the common property externality. This management philosophy has led to increasingly complex and invasive management regulations designed to correct symptoms resulting from the common property externality. If this market externality is left uncorrected, this regulatory pattern can be expected to continue in both fisheries.

As overfished fisheries are subject to stricter management measures designed to promote rebuilding, fishing effort in open access fisheries is likely to intensify. There is evidence that

vessels from other depleted fisheries have entered the Atlantic swordfish and shark fisheries; vessel owners may be attempting to enhance their future security by developing a catch history in alternative fisheries. One indication that these problems are becoming more severe is that prior to 1995, the U.S. swordfish longline fleet had not caught its quota; with the recent trend of decreasing quotas, seasonal closures have occurred. Preventing further expansion of the fleet size will help to prevent the fishing season from becoming even shorter in the future.

Given the Magnuson-Stevens Act mandate to rebuild overfished fisheries, limited access is an important first step toward a comprehensive rebuilding program for Atlantic swordfish and sharks. NMFS believes that the problems of overfishing and overcapitalization in these fisheries must be addressed jointly to enable an economically-viable fishery to harvest a sustainable resource. Limited access, as described in this FMP, will not impact the “capability of fishing vessels used in the fishery to engage in other fisheries” (16 U.S.C. 1583 § 303(b)(6)(D)). This limited access system does not restrict or limit vessel owners who currently hold permits in the Atlantic swordfish or shark fisheries from participating in other fisheries. Instead, this system restricts vessels without historical landings from entering and participating in the Atlantic shark and swordfish fisheries. Sections 4.7.1 and 4.7.2 discuss the restrictions on transferability and upgrading of vessels with limited access permits. Both sets of restrictions were designed to be consistent with similar restrictions proposed in other fisheries with the flexibility to change as the needs of the fishermen change. The physical configuration of vessels currently participating in these fisheries is such that the vessels can and do participate in other fisheries (such as reef fish, snapper-grouper, dolphin) without requiring any vessel modifications. As such, NMFS does not believe limited access will inhibit fishermen from engaging in other fisheries.

NMFS is aware that some of the actions implemented in this limited access system may impact fishing communities. NMFS considered ways to minimize any impacts and to ensure continued participation of these communities in making the final decision. A full description of any impacts can be found in Chapter 9.

#### *Individual Transferable Quotas (ITQs)*

Currently, there is a moratorium on the formation and implementation of any new limited access program based on individual transferable quotas (ITQs) until October 1, 2000. As required under the Magnuson-Stevens Act, the National Academy of Sciences (NAS) has conducted a study on the effectiveness of ITQs in addressing the problems of excess fishing effort and capacity. Their report was released in late 1998. This report can be found on the web at <http://www.nap.edu/bookstore/isbn/0309063302.html>.

The Magnuson-Stevens Act requires that any ITQ system approved on or after October 1, 2000, should consider the findings of the NAS report and ensure that any program:

1. establishes procedures and requirements for the review and revision of the terms of any program;
2. if appropriate, establishes procedures and requirements to renew, reallocate, or reissue ITQs;
3. provides for effective enforcement and management of the program including adequate observer coverage;
4. provides for a fair and equitable initial allocation of ITQs;
5. prevents any person from acquiring an excessive share of the ITQs; and
6. considers the allocation of a portion of the annual harvest in the fishery for entry-level fishermen, small vessel owners, and crew members who do not hold or qualify for an ITQ.

ITQs are a potential long-term management tool which can provide many of the benefits of a limited access system while also increasing the value of the fishery. Under this type of system, once a TAC or total landings quota is set for the fishery, each fisherman who holds an ITQ would know their own individual quota and could plan their business accordingly. After October 1, 2000, NMFS may consider the option of an ITQ system for all HMS fisheries, based on the limited access system established here, the final findings report of the NAS, and any other relevant information and law.

### **4.3 Limitations on Access**

Previously, there have been no limits on the number of permits issued to commercial vessel owners for Atlantic swordfish or shark fishing. Anyone who owns a registered vessel capable of catching Atlantic swordfish or sharks using authorized gear types, and for sharks, meets the earned income requirement, may obtain a permit for that vessel. In the shark fishery, if an owner does not meet the earned income requirement, the owner can still obtain a permit if the vessel operator meets the earned income requirement.

#### **Final Action: Limit access to the Atlantic swordfish and shark fisheries**

Under this action, only those fishermen qualify for a limited access permit, or those fishermen who buy a limited access permit from a vessel owner who is leaving the fishery, is allowed to operate in these fisheries. This action will reduce the overcapitalization problem in these fisheries and will be a first step in rationalizing the available quota to the fishing capacity. Thus, this action should alleviate some of the problems in the fisheries such as the derby fishery and market gluts as described in Section 4.2 above. It should be emphasized that fishermen who obtain limited access permits under this action are receiving a privilege, not a right in perpetuity, which may be withdrawn at some point in the future if necessary to rebuild the stock or for other management purposes required by the Magnuson-Stevens Act or other law.

*Conclusion*

This action is selected because it addresses rebuilding (NS 1) by removing the over-capitalization in the fishery, safety at sea (NS 10) by reducing the derby fishery, and bycatch concerns (NS 9) by giving fishermen an incentive to set and retrieve gear more carefully, consistent with the objectives of limited access and this FMP.

### **Rejected Options for Limitations on Access**

Rejected Option: Status quo

Under this alternative, any fisherman with a vessel and authorized gear interested in entering either the Atlantic swordfish or shark fisheries would be able to do so for a fee. Also, fishermen who have been issued a permit in these fisheries but do not consistently land either swordfish or sharks could become increasingly active in the fisheries. Given the overfished status of Atlantic swordfish and sharks, any increase in the number of participants, or the level of effective fishing capacity would exacerbate problems in the fishery. These problems might be particularly acute if management measures in other fisheries become more restrictive. Such restrictions might force additional fishermen to enter, or become active in, the shark or swordfish fisheries. As described in Section 4.2 above, open access might shorten the fishing season, increase the derby effect, and increase market gluts.

#### *Conclusion*

This alternative is rejected due to concerns about rebuilding needs (NS 1), safety at sea (NS 10), and bycatch levels (NS 9) as described in Section 4.2 above.

## **4.4 Limitations on Number of Permitted Vessels**

### **Final Action: Remove latent effort**

This action will restrict the number of permit holders in the Atlantic swordfish and shark fisheries by establishing permit and landings thresholds. This alternative will establish a two-tiered system consisting of directed and incidental permits. The two types of permits will allow the directed fisheries to be defined and regulated separately from commercial fisheries that target other species, but that take swordfish and/or sharks incidentally. Persons holding directed fishing permits are eligible to participate in the directed fisheries, while those holding incidental permits have more restrictive management measures and are restricted to incidental fisheries. This action will stop the growth of harvesting capacity in the Atlantic swordfish and shark fisheries, limit these fisheries to historic and current participants only thereby reducing latent effort, and begin the process of matching the level of fishing capacity to the available quota or total allowable catch. This action also reduces the incentive to target Atlantic swordfish or sharks when fishing for other species. A disadvantage of this system is that it could force fishermen in other fisheries who are unable to obtain a limited access permit, either directed or incidental, to discard swordfish and sharks that they are unable to avoid catching. This disadvantage is mitigated to some extent because fishermen who land swordfish and/or sharks should be permitted as described below.

Note that fishermen holding limited access permits under this action are receiving a privilege, not a right in perpetuity, which may be withdrawn at some point in the future if necessary to rebuild the stock or for other management purposes required by the Magnuson-Stevens Act or other applicable law.

### *Conclusion*

This action is selected because it will restrict the growth of latent effort and reduce the overcapitalization which is occurring in these fisheries.

## **Rejected Options for Limitations on Number of Permitted Vessels**

Rejected Option: Cap the number of vessels at current levels

This alternative is the same as a permit moratorium. Any fisherman who currently holds an Atlantic swordfish or shark permit would receive a limited access permit. Under this alternative, there would be no minimum landings threshold or other historical criteria; all current permit holders would qualify. However, many of these permit holders are not economically dependent on these fisheries. Also, this alternative does not differentiate between those permit holders with historical participation and those who have no history of participation in the fishery (speculative permit holders).

### *Conclusion*

This alternative is rejected because, while restricting the growth of latent effort, it would not reduce the latent effort in the fisheries. Therefore, this alternative does not address the goal of rationalizing the current fishing effort with the current quota.

## **4.5 Initial Permit Issuance**

Currently, NMFS requires that both Atlantic swordfish and shark commercial permits be renewed annually; however, there is no penalty for allowing a permit to lapse. Many permit holders have allowed their permits to lapse for varying lengths of time, in part because of the seasonal nature of the various fisheries. Harpooners and other handgear operators may have let their permits lapse due to the reduced availability of large fish. Thus, the permit and landings eligibility periods need to be flexible.

**NOTE:** Although the limited access chapter of this FMP combines the alternatives for the commercial Atlantic swordfish and shark fisheries, these fisheries are separate. A total of five separate limited access permits are available: directed swordfish, incidental swordfish, swordfish handgear, directed sharks, and incidental sharks. To qualify for an Atlantic swordfish limited access permit, a fisherman must meet the swordfish landings thresholds and permit eligibility time frames. To qualify for an Atlantic shark limited access permit, a fisherman must meet the shark landings thresholds and permit eligibility time frames. These requirements are outlined below.

### *Catch Histories*

Catch histories are assumed to belong to the permit holders rather than to the vessel, i.e., if a permit holder sells one vessel and buys another, he/she retains the history of the vessel sold and does not acquire the history of the vessel purchased unless otherwise stated in a written agreement. Thus, persons or entities purchasing existing vessels have not also purchased that vessel's catch history (since the fisheries are currently open access, it would be imprudent for someone to pay money for a catch history from which he/she may never benefit). However, the establishment of control dates for Atlantic swordfish and sharks by NMFS changed this assumption as several vessels were purchased after the control date with stipulations in the sales contract that the vessel's catch history was being purchased as well. Therefore, NMFS will accept the transfer of a vessel's permit history with a written agreement signed by the buyer and the seller verifying that the former owner transferred/sold the vessel's fishing and permit history. It should be noted, however, that only the buyer of the vessel's fishing and permit history will be eligible for a directed or incidental swordfish permit based on that vessel. The history will no longer be attributable to the seller.

NMFS will issue only one limited access permit for a single vessel's catch history. NMFS will consider only vessel histories bought or sold in entirety; vessel histories cannot be split or consolidated. One of the primary objectives of this limited access program is to freeze the harvesting capacity of the current fleet as a first step to rationalization of these fisheries, and allowing vessel histories to be split or consolidated might result in increases in fleet capacity. The restriction on splitting vessel histories is intended to prevent increases in fleet capacity that would result from multiple vessels qualifying for a limited access permit based on a single vessel's catch history. Similarly, landings may not be consolidated among vessels; permit holders may not pool landings from several ineligible vessels to meet eligibility requirements. This restriction is intended to prevent increases in fleet capacity that would result from the pooling of multiple ineligible vessel catch histories to be eligible for a limited access permit.

### *Owners vs. Operators*

As mentioned above, the Atlantic swordfish and shark fisheries are distinct fisheries despite the combination of the limited access actions in this FMP. Accordingly, there are a number of differences in the specific measures selected as a result of different management histories. The issue of owners vs. operators in determining eligibility for limited access permits is one difference resulting from distinct management histories that has implications for the limited access system. In the Atlantic swordfish fishery, vessel permits have been issued solely to vessel owners; operators of fishing vessels are not issued vessel permits. The limited access system established in this FMP will not change this. Only vessel owners are eligible for a swordfish limited access permit.

In the Atlantic shark fishery, permits have also been issued to vessel owners. However, shark regulations stipulated that either the owner or the operator could meet the earned income requirement. If the operator met the earned income requirement and the owner did not, the vessel permit was valid only when that operator was operating the vessel (see 50 CFR 678.4(a)(iii)). The operator could be removed from the permit the following year if the owner met the earned

income requirement without the operator. To maintain this historic balance between vessel owners and operators where the current permit requires the operator's presence, NMFS will issue shark limited access permits to vessel owners and require that permits are valid only when the operator listed on the permit is onboard. This operator restriction is only valid until May 30, 2000. After that time, shark limited access permits renewed under this limited access system will no longer have the operator listed and all limited access permits will be valid regardless of whether or not the operator listed on the permit is onboard.

#### **4.5.1 Permit Eligibility Period - Historic**

**Final Action:** To be eligible for a limited access permit in the Atlantic swordfish or shark fisheries, vessel owners must have held a valid permit in the swordfish fishery (for a swordfish limited access permit) or the shark fishery (for a shark limited access permit) at any time between July 1, 1994, through December 31, 1997

This action supports the goal of this limited access system: to freeze current harvesting capacity and reduce latent effort. The beginning date of permit eligibility is July 1, 1994, which is a full year previous to the ANPR (60 FR 38785, July 28, 1995) and the announcement of the availability of the options paper for limited access for Atlantic swordfish and sharks. The ending date of the permit eligibility is December 31, 1997, which is approximately a year after limited access was first proposed for the Atlantic swordfish and shark fisheries. This action will reduce latent effort without significantly affecting the livelihoods of those who are substantially dependent (see definition below) on the fisheries. In addition, including the permit database through 1997 ensures that fishermen who fish for swordfish primarily in the south Atlantic can meet the historic eligibility period requirement. (U.S. fishermen who fish in the south Atlantic were not required to have a swordfish permit until October 1997 (62 FR 55357)).

#### *Conclusion*

This action is selected because it advances the goals of limited access: to freeze harvesting capacity and reduce latent effort.

#### **Rejected Options for the Historic Permit Eligibility Period**

**Rejected Option:** To be eligible for a limited access permit in either the Atlantic swordfish or shark fisheries, vessel owners must have held a valid permit in either the swordfish fishery (for a swordfish limited access permit) or the shark fishery (for a shark limited access permit) at any time between July 1, 1994, through June 30, 1995

These dates were proposed in the ANPR as well as the associated concept papers. The beginning date of permit eligibility is July 1, 1994, which is a full year previous to the ANPR (60 FR 38785, July 28, 1995) and the announcement of the availability of the options paper for limited access for Atlantic swordfish and sharks. NMFS concludes that this alternative is

too restrictive because it may exclude recent entrants to the fishery who participated in the scoping meetings and limited access workshops held in December 1995. Also, this alternative does not match the goal of this limited access program, which is to freeze current harvesting capacity.

#### *Conclusion*

This option is rejected because it may exclude recent, substantially dependent participants (see Section 4.5.4, below), inconsistent with the goal of limited access to reduce latent effort only.

**Rejected Option:** To be eligible for a limited access permit in either the Atlantic swordfish or shark fisheries, vessel owners must have held a permit in either the swordfish fishery (for a swordfish limited access permit) or the shark fishery (for a shark limited access permit) at any time between July 1, 1994, through December 31, 1995

This alternative defines a valid time period that corresponds to NMFS' development of the limited access proposal. The end date of permit eligibility is December 31, 1995, which marks the end of scoping meetings and workshops held to gain public input on the options paper and inform the public of the intention to develop a limited access proposal. At that time, NMFS began developing the previously proposed rules to establish eligibility criteria based on historical and current participation in the fisheries.

However, given the length of time since the end of this eligibility period, NMFS now believes this time period is outdated and does not correspond to the goal of limited access to reduce latent effort only. Both the Atlantic swordfish and shark fisheries are dynamic and a number of participants enter and leave these fisheries each year. This is especially true with the recent trend of decreasing quotas and shortened seasons. Also, since December 1995, a number of other changes in regulations in both fisheries have occurred which may have led to additional changes in the dynamics of both fisheries.

#### *Conclusion*

This option is rejected because it may exclude recent, substantially dependent participants (see Section 4.5.4, below), and because extending the historic eligibility time frame better meets the goal of limited access to reduce only latent effort.

### **4.5.2 Landings Eligibility Period**

**Final Action:** To be eligible for a limited access permit in the Atlantic swordfish or shark fisheries, vessel owners must have reported landings in either the swordfish fishery (for a swordfish limited access permit) or the shark fishery (for a shark limited access permit) at any time between January 1, 1987, to December 31, 1997, (for swordfish) or January 1, 1991, to December 31, 1997 (for shark)

The beginning dates of these time periods were chosen because: 1) 1987 was the first full year of mandatory logbook reporting for swordfish, thus providing the earliest verifiable landings data for all swordfish participants; 2) 1991 is three years before the shark control date and before mandatory reporting for sharks thus providing for a longer time series than would be possible if the landing eligibility period began with mandatory reporting; 3) a long time series accommodates annual variations in historical participation; and 4) comments during scoping meetings supported use of a long time series. Currently, 1997 is the most recent complete year of logbook data fully entered and checked; thus, 1997 is the most recent year which can be used to perform the initial qualification analyses. In addition, the comment periods for both original limited access proposals for the Atlantic swordfish and shark fisheries ended in 1997. Thus, NMFS believes that entrants after 1997 knew and understood the risk to entering these fisheries at that time. This action is reasonably restrictive while allowing for some recent entrants into the fisheries.

### *Conclusion*

This action is selected because it matches the goal of limited access to reduce latent effort without significantly affecting the livelihood of those participants substantially dependent on these fisheries. This action allows recent, participating entrants to continue to participate, provided they meet the appropriate landings threshold, but is not so liberal that it will allow speculative entrants to qualify.

### **Rejected Options for the Landings Eligibility Period**

**Rejected Option:** To be eligible for a limited access permit in the Atlantic swordfish or shark fisheries, vessel owners must have reported landings in the swordfish fishery (for a swordfish limited access permit) or the shark fishery (for a shark limited access permit) at any time before the control dates in each respective fishery

NMFS established a control date in the Atlantic swordfish fishery of August 31, 1991, and in the Atlantic shark fishery of February 22, 1994, as a means of discouraging entry into these fisheries. These control dates mean that anyone entering the fishery after the above date may not be assured of future access to the fishery if the number of participants in the fishery is limited at some time in the future. The continued expansion of permit holders since the control dates were established indicates that these control dates have not been effective in discouraging entry into the fisheries.

Using the control date as the cutoff for determining eligibility, either in terms of having a permit or having received proof of landings, would be the most restrictive of alternatives presented. In addition, despite efforts to advise potential entrants of the control dates, it is possible that some individuals were unaware of the date and have made substantial investment to enter the fisheries since then. This potential is increased by the length of time between publication of the control dates and publication of this FMP. NMFS believes that too much time has passed since the control dates were established to use them as criteria for defining limited access systems in the swordfish and shark fisheries.

Also, the Atlantic shark FMP was implemented on April 26, 1993, and shark fishermen had until July 1, 1993, to obtain an Atlantic shark permit. Using the shark control date as the end cutoff date would allow less than one year of landings data to be used in determining eligibility for the directed shark fishery. NMFS believes that an eight-month period is insufficient to adequately document shark landings, especially because the large coastal shark fishery was closed for much of that time.

### *Conclusion*

This alternative is rejected because the time since the established control date has been of sufficient length that recent entrants who are substantially dependent (see Section 4.5.4 below) on the fishery would be excluded. Thus, this alternative may exclude active participants and is contrary to the goal of limited access.

**Rejected Option:** To be eligible for a limited access permit in the Atlantic swordfish or shark fisheries, vessel owners must have reported landings in the swordfish fishery (for a swordfish limited access permit) or the shark fishery (for a shark limited access permit) at any time between January 1, 1987, to June 30, 1995, (for swordfish) or January 1, 1991, to June 30, 1995 (for shark)

The beginning dates for these time periods were chosen for the same reason as the selected action. June 30, 1995, is the end of the last full month prior to the date of publication (July 28, 1995) in the *Federal Register* of an ANPR announcing NMFS' intention to propose a temporary limited access system for the issuance of directed fishery permits for Atlantic swordfish and sharks. It is also the date proposed in the Concept Paper, "Options for Establishing an Interim Permit Moratorium and Eligibility Criteria for the Atlantic Swordfish (or Shark) Fishery" (NMFS, 1995) and the cutoff date preferred in the draft proposed amendments for Atlantic swordfish and sharks. In addition, these dates are the same as the preferred alternative in the original swordfish and shark proposed limited access amendment.

This alternative is less restrictive than using the control dates and would allow potential eligibility to the more current participants in the fishery, provided they could meet the associated landings threshold. The intent of this alternative would be to reduce or preclude any further speculative rush of new entrants prior to establishment of limited access. However, the end of the eligibility period is over two years ago and may exclude fishermen who did not enter the fisheries until late 1995 or after. Thus, NMFS believes that too much time has passed for this alternative to meet the goals of limited access.

### *Conclusion*

This alternative is rejected because it may exclude recent participants and no longer reflects the goal of limited access of freezing current harvesting capacity and reducing latent effort only.

**Rejected Option:** To be eligible for a limited access permit in the Atlantic swordfish or shark fisheries, vessel owners must have reported landings in the swordfish fishery (for a swordfish limited access permit) or the shark fishery (for a shark limited access permit) at any time between January 1, 1987 and the date of publication of final rule (for swordfish) or January 1, 1991 and the date of publication of final rule (for shark)

Use of the publication date of the proposed rule as a cutoff date would be the most liberal of the alternatives presented here. Since this would be a date in the future, it would allow additional new entrants into the fishery (assuming other eligibility criteria such as landings requirements are met). It is likely that the number of participants in the fishery would increase, perhaps substantially, due to speculative entry and attempts to establish catch histories. This would diminish the effectiveness of limited access as a mechanism for stabilizing fleet capacity. Other problems are the delays between data collection and electronic availability of logbook records, the long period required to analyze the permit and logbook data, and the length of time taken to notify permit holders of the results of these analyses. NMFS estimates that it would take a minimum of four to six months for this series of events to be completed.

### *Conclusion*

This alternative is rejected because, while it is the least restrictive of all the alternatives, it would delay implementation of the final rule after publication by approximately four to six months for the analyses to be complete.

### **4.5.3 Permit Eligibility Period - Recent**

**Final Action:** To be eligible for a limited access permit in the Atlantic swordfish or shark fisheries, vessel owners must have held a valid permit in the swordfish fishery (for a swordfish limited access permit) or the shark fishery (for a shark limited access permit) at any time between June 1, 1998, to November 30, 1998, (for swordfish) or January 1, 1998, to December 31, 1998 (for shark)

These two time periods represent recent fishing seasons for both fisheries. NMFS believes that it is reasonable to assume that fishermen interested in continued participation in these fisheries would have held valid permits during the most recent open season. However, because the fishing seasons are so short for large coastal sharks (the most important commercial shark species), many fishermen may have decided not to fish during the second fishing season of 1998. This season was open only from July 1, 1998, to August 4, 1998. Thus, to be fair to fishermen who fished only during the first season of the shark fishery, NMFS expanded this period to all of 1998 for shark fishermen. For Atlantic swordfish, the last open season began on June 1, 1998, and did not close. NMFS believes that active participants interested in landing Atlantic swordfish would have held an active swordfish permit at some point during this open fishing season. Because these dates are in the past, NMFS can complete logbook and permit database analyses before the date of publication of

the final rule and speculative entrants will not be eligible for a limited access permit. This action, while fairly lenient, should still remove participants who have legitimately exited from the fisheries. However, this alternative should not remove active participants whose permits may have lapsed for a short period of time.

### *Conclusion*

This action is selected because NMFS believes it is consistent with the goal of limited access of removing latent effort while allowing active participants to continue to participate in the fisheries.

### **Rejected Options for the Recent Permit Eligibility Period**

**Rejected Option:** To be eligible for a limited access permit in the Atlantic swordfish or shark fisheries, vessel owners must hold a valid permit in the swordfish fishery (for a swordfish limited access permit) or the shark fishery (for a shark limited access permit) on the date of publication of final rule

This alternative was suggested in the proposed limited access rules for both Atlantic swordfish and sharks to prevent anyone who had legitimately gotten out of the fishery from qualifying. However, this alternative would delay implementation of the final rule after publication until such time as everyone who qualified was notified. This alternative also would prevent anyone whose permit had lapsed on the day of publication of the final rule from qualifying.

### *Conclusion*

This alternative is rejected because, while eliminating those who have legitimately exited from the fishery, it may also remove active participants whose permits have lapsed, even if only for a day.

**Rejected Option:** To be eligible for a limited access permit in the Atlantic swordfish or shark fisheries, vessel owners must have held a valid permit in either the swordfish fishery (for a swordfish limited access permit) or the shark fishery (for a shark limited access permit) at any time between June 1, 1998, to August 31, 1998, (for swordfish) or July 1, 1998, to August 4, 1998 (for shark)

As with the selected action, these dates represent recent seasons for both fisheries. These were the dates preferred in the draft FMP. However, in the limited access analysis completed after the draft FMP was released, NMFS discovered that these dates, at least for shark, may exclude active participants, especially given the short fishing season.

### *Conclusion*

This alternative is consistent with the goal of limited access of removing latent effort while allowing active participants to continue to participate in the fisheries; however, it may exclude active participants, especially shark permit holders and is therefore rejected.

#### **4.5.4 Directed Landings Thresholds**

The intent of the logbook and permit database analyses was to define a landings threshold for directed permit holders associated with a threshold income that indicates which permit holders are “not substantially dependent” on these fisheries. Many permit holders target other species during the course of a year. As described in the Regulatory Impact Review for the Bluefin Tuna Fishery (NMFS, 1992), a figure of \$5,000 in annual gross revenues may be employed as the cutoff for “not substantially dependent.” Thus, any fisherman who earned less than \$5,000 in annual gross revenues from the swordfish or shark fisheries would be considered “not substantially dependent” on that fishery. This is considered to be a lenient threshold, particularly since net revenues (gross revenues minus costs) will be substantially less.

To determine the number of Atlantic swordfish that a permit holder would need to land to reach this threshold since 1987, NMFS applied recent average prices to the average size swordfish landed by the commercial fishery, as follows. Swordfish landed in the Atlantic fishery by U.S. vessels recently averaged 67 lbs dw (90 lbs ww). The average ex-vessel price paid to fishermen for this size fish was approximately \$2.96 per lb dw<sup>1</sup>. Thus, the average size fish had a landed value of about \$198. Approximately 25 such swordfish would need to be landed per year to meet the \$5,000 annual threshold in the swordfish fishery.

A similar formula was used to calculate the number of sharks that a permit holder would need to land to reach that threshold since 1991. The average weight of sharks in 1997 was approximately 43 lbs dw (60 lb ww). The ex-vessel price paid to fishermen for shark meat in 1997 averaged \$0.55 per lb dw and the average ex-vessel price paid to fishermen for shark fins was \$11.67 per lb. Assuming fins constitute five percent of the total amount of shark meat, the average size shark landed has a value of approximately \$49. Thus, 102 sharks are needed to meet the \$5,000 annual gross revenue threshold in the shark fishery.

**Final Action: Require landings of at least 25 swordfish or 102 sharks, or documentation indicating landings of at least \$5,000 gross revenue worth of swordfish or sharks, per year in any two calendar years during the landing eligibility period to be eligible for a directed swordfish or a directed shark limited access permit**

For this action, swordfish vessel owners who meet the swordfish permit eligibility requirements above must have landings of at least 25 swordfish per year in any two calendar years during the landing eligibility period described above to qualify for a directed swordfish limited access permit. Shark vessel owners who meet the permit eligibility requirements above must have landings of at least 102 sharks per year in any two calendar years during the

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<sup>1</sup> Larkin et. al, 1998, used a figure of \$2.96/lb whole weight. Given the recent decline in swordfish prices, NMFS believes that a figure of \$2.96/lb dressed weight is reasonable price from which to obtain a proxy for \$5,000.

landing eligibility period described above in order to qualify for a directed shark limited access permit. The landing thresholds established by this action are equal to approximately \$5,000 in gross revenues per year. However, because the ex-vessel price of swordfish or sharks depend on the size of the fish, the quality of the fish, and the market at the time of offloading and the landings threshold in number of fish is used as a proxy for \$5,000 gross revenue, NMFS will also accept documentation indicating the vessel owner landed at least \$5,000 gross revenue worth of swordfish (for a swordfish limited access permit) or shark (for a shark limited access permit). This documentation will only be accepted in an application or an appeal. Acceptable documentation includes documentation already submitted to NMFS such as logbook records, official, verified sales slips attached to weigh out slips, or receipts from registered dealers.

NMFS believes this action is fairly lenient in that it requires vessel owners to be substantially dependent on these fisheries for only two years but not so lenient that it will allow speculative permit holders into the fisheries. The approach of using only two years of data ensures that those owners who did not participate continuously during the full qualifying period, but instead chose to fish primarily for other species periodically, would not be penalized inappropriately with subsequent exclusion for the directed fishery. NMFS estimates that 194 vessels will qualify for a directed swordfish limited access permit and 207 vessels will qualify for a directed shark limited access permit. However, these numbers may change based on applications.

### *Conclusion*

This action is selected because it will remove fishermen who are not substantially dependent on these fisheries, while allowing recently dependent fishermen to qualify. This action also minimizes negative economic and social impacts, consistent with the goals of limited access and NS 8.

**Final Action: To be eligible for an Atlantic swordfish directed or incidental permit, fishermen must obtain at least an Atlantic shark incidental permit**

Under this action, fishermen who wish to obtain an Atlantic swordfish directed or incidental permit must obtain an Atlantic shark limited access permit (directed or incidental) as well. Due to the non-selective nature of the gear, many swordfish vessels catch sharks incidentally. NS 9 requires minimizing bycatch to the extent practicable and this action would ensure that swordfish directed fishermen who catch sharks incidentally can still land some of those sharks. This action also ensures that those swordfish fishermen that incidentally catch sharks continue to report those catches/landings. This will aid in the collection of the best scientific data (NS 2).

Note that those vessels that qualify for a swordfish limited access permit may be automatically eligible for an incidental shark permit. See Section 4.5.5 below.

### *Conclusion*

This action is selected because it will minimize bycatch and regulatory discards, consistent with NS 9. It also ensures continued reporting of all catches and landings, consistent with NS 2.

### **Rejected Options for Directed Landings Thresholds**

**Rejected Option:** Require landings of at least 18 swordfish per year in any two calendar years during the landing eligibility period to be eligible for a directed swordfish limited access permit. Require landings of at least 250 sharks before and 125 after control date to be eligible for a directed shark limited access permit

These options were the preferred alternatives in the previously proposed limited access rules. The number of swordfish and sharks used for these alternatives are based on the definition for “not substantially dependent,” as defined above, but using average prices and weights as specified in the previously proposed limited access amendments. For sharks, this alternative estimates that the gross revenue from shark fishing would average \$5,000 per year for the entire landings eligibility period of the previously proposed rule.

NMFS believes these that landings thresholds are no longer appropriate. Since the previously proposed limited access rules, average prices have changed, leading to a different number of fish required for the definition of “substantially dependent.” In addition, the control date for sharks, while reasonable at the time of the previously proposed rule, may no longer be indicative of currently active participants in the Atlantic shark fishery.

### *Conclusion*

This alternative is rejected because of updated average price data which affect the “not substantially dependent” landings threshold, and because use of the control date for sharks is not believed to be appropriate due to the time elapsed since that date.

**Rejected Option:** Require landings of at least 100 swordfish or 408 sharks per year in any five calendar years during the landing eligibility period to be eligible for a directed swordfish or a directed shark limited access permit

**Rejected Option:** Require landings of at least 100 swordfish or 408 sharks per year in any two calendar years during the landing eligibility period to be eligible for a directed swordfish or a directed shark limited access permit

**Rejected Option:** Require landings of at least 50 swordfish or 204 sharks per year in any five calendar years during the landing eligibility period to be eligible for a directed swordfish or a directed shark limited access permit

**Rejected Option:** Require landings of at least 50 swordfish or 204 sharks per year in any two calendar years during the landing eligibility period to be eligible for a directed swordfish or a directed shark limited access permit

**Rejected Option:** Require landings of at least 25 swordfish or 102 sharks per year in any five calendar years during the landing eligibility period to be eligible for a directed swordfish or a directed shark limited access permit

**Rejected Option:** Require landings of at least 12 swordfish or 51 sharks per year in any five calendar years during the landing eligibility period to be eligible for a directed swordfish or a directed shark limited access permit

**Rejected Option:** Require Landings of at least 12 swordfish or 51 sharks per year in any two calendar years during the landing eligibility period to be eligible for a directed swordfish or a directed shark limited access permit

The landing thresholds shown in the above seven rejected options range from \$2,500 to \$20,00 gross revenues per year. Those options that require gross revenues at the higher end (e.g., \$10,000 and \$20,000) are restrictive in that they require vessel owners to have targeted Atlantic swordfish or sharks consistently for a period of time. The restriction is even higher if vessel owners needed to maintain these landings levels for a period of five years. Those alternatives may not be indicative of fishing practices in these fisheries. Vessel owners tend to fish for a number of species, especially given the short seasons due to reduced quotas (especially in the Atlantic shark fishery). NMFS believes those restrictive alternatives might severely impact both participants and producers and may eliminate fishermen who are substantially dependent on the Atlantic swordfish and shark fisheries. The high levels of gross revenues per year with those alternatives that require two years of landings data are more lenient but still could eliminate those vessel owners and operators who are truly multi-species fishermen.

Those options above that require gross revenues at the low end (e.g., \$2,500) might be overly lenient and might allow relatively inactive participants to continue in the fishery. This might put undue financial stress of those vessels who are truly dependent on the fisheries.

### *Conclusion*

These alternatives are rejected because they would not meet the objectives of limited access to reduce latent effort without significantly affecting the livelihood of fishermen substantially dependent on the fisheries, and might severely impact fishery participants and producers. In addition, some of the options would allow relatively inactive participants to continue in the fishery, inconsistent with the goal of this limited access system.

**Rejected Option:** To be eligible for an Atlantic shark directed or incidental permit, must obtain at least an Atlantic swordfish incidental permit.

This alternative is similar to the second final action above. However, unlike the swordfish fishery that regularly catches large coastal sharks and pelagic sharks, the bottom longline fishery (primarily shark fishing) does not regularly catch swordfish or tuna, according to observer data (Branstetter and Burgess, 1997). Many shark fishermen, especially those concentrated in the Gulf of Mexico or those who also target Gulf reef fish

and the snapper-grouper complex may not ever catch a swordfish. For these reasons, although NMFS believes swordfish limited access permit holders should have at least an incidental shark permit, NMFS does not believe shark limited access permit holders should be required to obtain an incidental swordfish permit. Indeed, if shark limited access permit holders were required to obtain a swordfish limited access permit, shark fishermen who are also in the Reef fish and Snapper grouper fisheries might decide to leave the shark fishery. If this happens, shark bycatch mortality might increase as those fishermen who target reef fish and the snapper-grouper complex but left the shark fishery would still catch sharks but would be forced to discard them.

### *Conclusion*

This alternative is rejected because it could minimize bycatch in the shark fishery (NS 9) by allowing some swordfish to be landed that would otherwise have to be discarded. However, this alternative would also increase regulatory discards of sharks and decrease data if fishermen in other fisheries leave the shark fishery due to the requirement to obtain a swordfish limited access permit.

#### 4.5.5 Incidental Landings Threshold

**Final Action:** Require landings of at least 11 swordfish during the landing eligibility period and establish a minimum earned income requirement for owners of more than 50 percent of their earned income from commercial fishing through the harvest and first sale of fish or from charter/headboat fishing, or those who had gross sales of fish greater than \$20,000 harvested from their vessel, during any one of the last three calendar years to be eligible for a swordfish incidental limited access permit. Require landings of at least seven sharks during the landing eligibility period to be eligible for an incidental shark limited access permit

This action requires landing an average of one swordfish or shark per year during the permit eligibility time period in order to qualify for an incidental limited access permit. NMFS believes this is a lenient threshold that will allow fishermen who currently land sharks or swordfish incidentally to continue doing so. NMFS believes that incidental permits should be issued only to those who have at least a minimal history of participation in fishing activities. An earned income requirement is one way of ensuring this participation. Current Atlantic shark permit holders provided earned income information to NMFS when they applied for a Federal shark permit. Swordfish permit holders, however, did not. NMFS believes that the eligibility criteria for earned income needed to obtain a commercial shark fishing permit (\$20,000 per year from gross sales of fish or 50 percent of their earned income) provides a reasonable measure of active participation in commercial fisheries. An estimated 72 swordfish fishermen and 354 shark fishermen would qualify under this threshold. These numbers may change due to applications.

#### *Conclusion*

This action is selected because it will continue to allow incidental landings, thus minimizing bycatch (NS 9). Fishermen with an incidental permit will be required to report catch and landings, thus improving scientific data (NS 2).

**Final Action:** If qualified for an initial directed or incidental swordfish limited access permit, will receive an incidental shark limited access permit

This action will allow those fishermen who qualify, under the qualifications described in Sections 4.5.1 through 4.5.4, for an initial directed or incidental swordfish limited access permit to receive an incidental shark permit. This action allows those swordfish fishermen who qualify for an initial directed or incidental swordfish limited access permits to continue to fish for swordfish and land an incidental number of sharks. Thus, this action not only reduces latent effort by requiring qualification of Atlantic swordfish directed or incidental permits, but also minimizes shark bycatch mortality. However, fishermen who wish to enter the swordfish fishery in the future must obtain, on their own, both a directed swordfish limited access permit and, at a minimum, an incidental shark limited access permit. NMFS

estimates that 41 fishermen will receive an incidental shark limited access permit based on this action.

### *Conclusion*

This action is selected because it is expected to meet limited access objectives, minimize bycatch (NS 9), and increase scientific data (NS 2).

### **Rejected Options for the Incidental Landings Threshold**

**Rejected Option:** Require landings of at least nine swordfish during the permit eligibility period and establish a minimum earned income requirement for owners of more than 50 percent of their earned income from commercial fishing through the harvest and first sale of fish or from charter/headboat fishing, or those who had gross sales of fish greater than \$20,000 harvested from their vessel, during any one of the last three calendar years to qualify for an incidental swordfish limited access permit. Require landings of at least three sharks before and two sharks after the control date to qualify for an incidental shark limited access permit

This alternative represents the preferred alternative in the previously proposed Atlantic swordfish and shark limited access rules. For swordfish, this alternative would require landings of approximately one swordfish per year for the nine years proposed as the landings eligibility period in the previously proposed rule, and would establish a minimum earned income requirement. For sharks, this alternative would require participation both before and after the control date at an average of one shark per year.

At the time of the previously proposed limited access rules, NMFS believed that a landing threshold of nine swordfish and a landings threshold using the control date for sharks was consistent with limited access objectives. However, NMFS now believes that, given the additional two years worth of landings data available, these thresholds should be updated to the extent practicable.

### *Conclusion*

This alternative is rejected due to the availability of an additional two years of data since limited access was first proposed for the Atlantic swordfish and shark fisheries. Thus, this alternative is inconsistent with NS 2.

**Rejected Option:** If qualified for an initial directed or incidental shark limited access permit, no swordfish landings required to obtain an incidental swordfish limited access permit

This alternative is similar to the second final action above; however, observer data indicate that directed shark fishermen do not catch swordfish incidentally during bottom

longline fishing operations (Branstetter and Burgess, 1997). Thus, this alternative could actually increase latent effort.

### *Conclusion*

This alternative is rejected because it could increase latent effort, contrary to the objective of limited access to reduce latent effort.

#### **4.5.6 Swordfish Handgear**

Authorized handgear in the Atlantic swordfish fisheries includes harpoon, rod and reel, and handline. Harpoon vessels formerly operating out of Rhode Island and Massachusetts traditionally took extended trips for swordfish north and east of the Hudson Canyon and particularly off Georges Bank. During such trips, they would land as many as 20 to 25 large swordfish over a ten-day period. However, due to decreased availability of the large swordfish they target, there are no known commercial harpoon fishermen (who use only harpoons) who have both a current permit and the specified landings required under the selected alternative for a directed permit. Without specific provisions, many handgear fishermen would otherwise be excluded from Atlantic swordfish fishing or be restricted to landing only the specified incidental retention limits of two swordfish per trip. Therefore, NMFS has developed separate criteria to address the unique nature of this traditional fishery.

Although handgear permits are not transferable to the directed or incidental fishery they are transferable among handgear permit holders, subject to upgrading restrictions (see Section 4.7). As the stock recovers and the traditional harpoon fishery returns, NMFS may consider allowing directed permits (primarily longline) to transfer to a handgear permit. This might decrease bycatch and aid in the conservation of the stock as the handgear fishery is highly size- and species-selective (NS 9). The handgear fishery will open and close with the directed fishery. Handgear permit holders will be responsible for following all other regulations in the fishery including landing reports and participation in the NMFS observer program. Fishermen who are interested in this type of limited access permit must apply within 180 days of publication of the final rule (see Section 4.5.8).

**Final Action: Issue a handgear permit to those fishermen who provide documentation of having been issued a swordfish permit for use with harpoon gear or those who landed swordfish with handgear as evidenced by logbook records, verifiable sales slips or receipts from registered dealers, or state landings records**

NMFS will issue a directed fishery handgear permit to those former and current harpooners who apply if they provide documentation of having been issued a swordfish permit for use with harpoon gear or having landed swordfish with handgear as evidenced by logbook records, verifiable sales slips or receipts from registered dealers, or state landings records, and if they used only handgear to harvest swordfish. Beginning in 1984, NMFS has records of which swordfish permit recipients indicated on the permit application that harpoon was one of four primary gear types used. Since fishermen were not required to indicate the

use of harpoon gear on the permit application, NMFS will also accept written evidence (logbook records; official, verifiable sales slips or receipts from registered dealers; or state landings records) that the fisherman landed swordfish with handgear.

The intent of this action is to allow those commercial fishermen who do not use longline gear to target large swordfish to use handgear as large fish become sufficiently abundant. The eligibility criteria are intended to include those who previously used harpoons, but who have allowed their permits to lapse because of reduced abundance of large fish. A number of fishermen who qualify for the directed fishery or for the incidental fishery may be able to produce documentation which would qualify them for a handgear permit. However, as fishermen are only eligible for one type of swordfish limited access permit per vessel and due to the reduced availability of swordfish to handgear, NMFS expects few fishermen who are eligible for a directed or an incidental swordfish limited access permit to apply for a handgear permit. An estimated 40 former harpooners are eligible for a handgear permit under these criteria.

NMFS believes that this action meets the Magnuson-Stevens Act requirement to take into consideration traditional fishing patterns of fishing vessels. Also, this action will allow traditional handgear fishermen to participate more fully as the stock recovers.

### *Conclusion*

This action is selected because it considers traditional fishing patterns (NS 8), but is not expected to increase latent effort, consistent with the Magnuson-Stevens Act and the goals of limited access.

**Final Action: Issue directed fishery handgear permits to those applicants who meet the earned income requirement, i.e., those who had derived more than 50 percent of their earned income from commercial fishing through the harvest and first sale of fish or from charter/headboat fishing, or those who had gross sales of fish greater than \$20,000 harvested from their vessel, during one of the three calendar years preceding the application**

This action establishes historical involvement in commercial fishing as the basis for eligibility. NMFS believes that the same minimum earned income requirement used for the swordfish incidental category permit is appropriate for the handgear category because it would eliminate those who have not been active in commercial fisheries from the handgear fishery.

NMFS believes that under this action, artisanal fishermen in the U.S. Virgin Islands and Puerto Rico, who have until now been exempt from having a Federal swordfish permit, will be able to qualify for a handgear permit and continue fishing. In addition, this action allows a way for interested commercial fishermen to participate in a traditional fishery. Thus, this action minimizes economic impacts.

### *Conclusion*

This action is selected because it considers traditional fishing patterns (NS 8), but is not expected to increase latent effort, consistent with the Magnuson-Stevens Act and the goals of limited access.

### **Rejected Options for Swordfish Handgear**

#### **Rejected Option:** Open access

This approach would provide an open access directed fishery for new entrants as well as previous participants, provided they used only handgear. Numerous comments stated that the handgear category should be open access because there are no satisfactory eligibility criteria that can be applied. Several commenters emphasized the advantages of the traditional handgear category, especially the highly size-selective and species-selective nature of the harpoon fishery. Since handgear is highly selective and targets mostly large fish, there would be little mortality of undersized swordfish or other bycatch. However, retaining open access in any segment of the commercial swordfish fishery would undermine the objective of eliminating latent capacity in the fishery. In addition, vessel owners with a directed swordfish permit are allowed to fish for swordfish using handgear. NMFS does not support leaving the handgear segment of the swordfish fishery open access because of the same potential for overcapitalization that has already occurred in the other segments of the Atlantic swordfish fishery.

#### *Conclusion*

This alternative is rejected because it would not reduce latent effort, and it is inconsistent with the goals of limited access.

#### **Rejected Option:** Require handgear permit applicants meet the swordfish permit and landings history requirements

This alternative would not provide exceptions or exemptions from the requirement to obtain a directed swordfish permit by meeting the permit and landings history requirements and using only currently authorized gear types. Under such an alternative, traditional handgear fishermen could not land or possess swordfish unless they could meet the directed or incidental limited access permit eligibility criteria. Additionally, this FMP requires mandatory permits for all commercial fishermen who land Atlantic swordfish with handgear (U.S. Virgin Islands and other areas are currently exempt from having a swordfish permit). Under this alternative, fishermen in those areas who have never held or been required to hold a swordfish permit would be excluded from their artisanal fishery because they could not meet the historic permit and/or landings requirements.

#### *Conclusion*

This alternative is rejected because it does not meet the limited access objective of not significantly affecting the livelihoods of fishermen dependent on the fishery, and is therefore,

inconsistent with NS 8. It does not consider any artisanal fishing communities in the Caribbean, and could discriminate against residents in various States (NS 4).

#### **4.5.7 BAYS Tuna Fishery**

In comments on the previously proposed limited access system, constituents noted that the lack of a similar proposal for the pelagic longline BAYS fishery would leave a “back door” open for entry into the multi-species pelagic longline fishery. If this happens, discards of swordfish and sharks might increase, contrary to the goals of limited access, this FMP, and the Magnuson-Stevens Act. To prevent this from happening, NMFS is finalizing actions which will ensure that all HMS longline fishermen carry a permit for the HMS with which they interact.

These actions will affect only fishermen who have an Atlantic tuna Longline permit (formally known as an Incidental permit). These actions will not affect General, Angling, Charter/Headboat, Purse Seine, or Harpoon tuna permit holders.

**Final Action: If a fisherman qualified for an initial directed or incidental swordfish limited access permit, NMFS will issue an Atlantic tuna longline permit. Fishermen without an Atlantic tuna longline permit will not be allowed to fish for Atlantic swordfish, except by fishermen with a swordfish handgear permit**

Under this action, fishermen who qualify for an initial directed or incidental Atlantic swordfish limited access permit are allowed to fish for and land Atlantic tuna according to the regulations regarding the use of the Atlantic tuna longline permit. This alternative will allow swordfish limited access permit holders to land tuna, and is therefore consistent with current BAYS regulations. In the future, fishermen wishing to enter the swordfish fishery would need to obtain not only a shark limited access permit (see Section 4.5.4), but also an Atlantic tuna longline permit. This action and the action below will reduce latent effort in HMS fisheries. NMFS estimates that 105 fishermen, who did not have an Atlantic tuna incidental permit, will receive an Atlantic tuna longline permit based on this criteria.

#### *Conclusion*

This action is selected because it is consistent with current regulations. In combination with the action below, this alternative is consistent with the goal of limited access to reduce latent effort without significantly affecting the livelihoods of fishermen substantially dependent on the fisheries (NS 8). In addition, as described above, this action is also consistent with the Magnuson-Stevens Act and will reduce discards in the longline fisheries (NS 9).

**Final Action: If a fisherman is not eligible for an initial swordfish or shark directed or incidental limited access permit but had a valid Atlantic Tuna Incidental Permit as of December 31, 1998, then NMFS will issue initial incidental swordfish and shark limited access permits; fishermen**

## **without these limited access permits are not allowed to fish for Atlantic tuna with longlines**

Under this action, those commercial longline fishermen who have an Atlantic tuna incidental permit to fish for and land BAYS tuna and bluefin tuna incidentally would be given incidental swordfish and shark limited access permits. This action will not have a negative economic impact tuna fishermen because the fishermen would not be required to buy a permit. In fact, this action would have a positive impact as this action allows longline fishermen to land swordfish and sharks incidentally. Thus, this action will decrease swordfish and shark bycatch mortality as BAYS fishermen would be able to land swordfish and sharks, subject to incidental harvest limits (see Section 4.6). The last day of the recent permit eligibility time period is December 31, 1998. This is an extension over the eligibility time period which was preferred in the draft FMP: August 31, 1998. NMFS believes that anyone interested in longlining for Atlantic tuna would have had a valid Atlantic tuna incidental permit in 1998. This alternative, in conjunction with the action above eliminates the growth of latent effort and is consistent with the goals for limited access. Any fisherman wishing to enter HMS commercial fisheries (i.e., pelagic longline) in the future will need to obtain an Atlantic tuna longline permit, a swordfish limited access permit, and a shark limited access permit. NMFS estimates that 141 fishermen will receive an incidental swordfish limited access permit and 157 fishermen will receive an incidental shark limited access permit under this criteria in this FMP.

### *Conclusion*

As with the action above, this action is selected because it minimizes bycatch (NS 9), is not expected to have negative economic impacts on producers, and is consistent with the objective of limited access to reduce latent effort.

### **Rejected Options for the BAYS tuna fishery**

#### **Rejected Option:** Status quo

Currently, fishermen who have an Atlantic tuna incidental permit can target BAYS tuna and land bluefin tuna incidentally. These fishermen may catch swordfish and sharks incidentally due to the non-selective nature of the gear, but are not currently *required* to have a swordfish or shark permit. Under limited access, these incidentally caught swordfish and sharks could not be landed by Atlantic tuna fishermen unless the fisherman holds a directed or incidental swordfish or shark permit. This alternative, in conjunction with limited access, would increase the regulatory discards of swordfish or sharks since tuna fishermen would still catch swordfish and sharks but would be forced to discard them.

### *Conclusion*

This action is rejected because it may increase bycatch (NS 9) and does not meet the limited access objective of reducing latent effort.

**Rejected Option:** Require a directed or incidental swordfish limited access permit to land BAYS tuna with longline gear; allow one year to obtain a directed or incidental swordfish limited access permit if not eligible

Under this alternative, any commercial BAYS tuna longline fisherman who wishes to continue to land tuna would be required to obtain a directed or incidental swordfish limited access permit within one year. If the fisherman obtained a directed permit, in conjunction with the final actions of Sections 4.5.4 and 4.5.5, he/she would also need to obtain at least an incidental shark permit. This alternative could have severe economic impacts on tuna fishermen because those fishermen who may be substantially dependent on the tuna fishery but do not fish for Atlantic swordfish or sharks would be required to buy a limited access permit from a participant in these fisheries.

### *Conclusion*

This alternative is rejected because it could have adverse economic impacts on tuna fishermen.

## **4.5.8 Appeals**

After an analysis of landings and permit histories, NMFS will notify all permit holders (Atlantic swordfish, shark, and tuna longline) by letter of their eligibility status for the directed or incidental swordfish or shark fisheries and issue the appropriate initial limited access permits to those who qualify. These swordfish and shark permits will be effective from June 1, 1999, until the regular date of their renewal (the vessel owner's birthday). If a fisherman qualifies for the directed or incidental permit and agrees with NMFS' determination, no action is required until the date of their annual permit renewal. If NMFS does not issue an initial limited access permit, or if an incidental permit is issued rather than a directed permit, a current permit holder may submit an application with appropriate documentation for the type of permit which he or she believes he or she is qualified to receive.

NOTE: NMFS will not automatically issue handgear permits. Any person or entity wishing to receive a handgear permit must submit an application and furnish the appropriate documentation necessary to demonstrate his or her eligibility, as outlined in this FMP.

All applications for limited access permits must be submitted to NMFS within 90 days of publication of the final rule. NMFS will make all attempts to circulate the final rule to interested constituents (fax notice, letter to permit holders, etc.). Any previously issued Atlantic swordfish or shark permit will be invalid as of June 1, 1999. All persons wishing to remain in the fishery will need a limited access permit, or a combination of limited access permits, to be renewed annually following the current NMFS permit renewal procedure (i.e., there is no need to "re-qualify").

### **4.5.8.1 Process**

## **Final Action: Written applications and appeals only**

The Chief of the Highly Migratory Species Management Division will evaluate all applications and accompanying documentation, then notify the applicant by letter of NMFS' decision to approve or deny the permit application. If the application is approved, then NMFS will issue the appropriate initial limited access permit(s). If denied, the applicant may appeal the decision within 90 days of receipt of the notice of denial. NMFS will issue provisional directed or incidental fishery permits, as appropriate, pending the outcome of an appeal, but not pending the outcome of an application.

NMFS will consider only written appeals. Landings eligibility criteria require evidence of documented legal landings during the time frame from January 1, 1987, through December 31, 1997 (for swordfish), or from January 1, 1991, through December 31, 1997 (for sharks). Landings documentation that NMFS will consider in support of an appeal for an Atlantic swordfish limited access permit is restricted to official NMFS logbook records or weigh out slips that were submitted to NMFS prior to March 2, 1998 (60 days after the cutoff date for eligible landings). Landings documentation that NMFS will consider in support of an appeal for Atlantic shark limited access permits is also restricted to official NMFS logbook records and weigh out slips during the time period that logbook reporting was mandatory. However, NMFS will also accept, verifiable sales slips or receipts from registered dealers, or state landings records from the period January 1, 1991, to July 1, 1993 (the date that Federal commercial shark permits became mandatory). NMFS will count only those Atlantic swordfish or sharks that were landed legally when the owner had a valid permit toward the eligibility requirement. No other proof of catch history will be considered. NMFS will issue swordfish handgear permits to those fishermen who provide verifiable evidence of having been issued a swordfish permit for use with handgear or to those fishermen who provide verifiable evidence of having met the earned income requirement. Such evidence includes, but is not limited to, permits, verifiable sales slips, or receipts from registered dealers. Photocopies of the written documents are acceptable in the original appeal or application; NMFS may request the originals at a later date. NMFS will refer any submitted materials that are of questionable authenticity to the NMFS Office of Enforcement for investigation.

NMFS will designate NOAA employees as appeals officers. These officers will consider disputes concerning eligibility for directed and incidental fishery permits. The appeals officers will review cases individually but will confer regularly to ensure consistency. The sole grounds for an appeal is that NMFS used incorrect or incomplete landings data in the eligibility analysis or improperly considered the applicant's earned income documentation, if applicable. Absent good cause for further delay, the appeals officers will review the written appeals for no more than 30 days before making a recommendation to the Director of the Office of Sustainable Fisheries, who will render the final decision.

### *Conclusion*

This action is selected because it provides all fishermen with equal and reasonable opportunities to appeal, consistent with NS 4.

### **Rejected Options for the Appeals Process**

#### **Rejected Option:** Written with option for oral hearing

This alternative would allow applicants to appeal in written format, under the guidelines set out in the above action, and also present an appeal in person at an oral hearing if the written appeal were denied. Those applicants who chose to have an oral hearing would be required to submit written documentation at least 30 days prior to the hearing to allow the appeals officers time to review the materials. Only valid documentation as specified above would be considered. If no proof or valid documentation were provided as the basis of the appeal, the request for an oral hearing could be denied. Persons appealing would be limited to 30 minutes of oral testimony. All oral hearings would be arranged before the appeals officers make their recommendations to the Office Director, and all decisions rendered by the Office Director would be final.

This alternative was not selected due to the logistical problems associated with hearing oral appeals in several regions and the possibility that it would discriminate against those fishermen who reside in areas where the oral appeals were not heard, potentially inconsistent with NS 4.

#### *Conclusion*

This alternative is rejected due to logistical problems and potential inconsistencies with NS 4.

#### **Rejected Option:** No appeals

The alternative of not establishing an appeals process is rejected because it could be perceived as unfair and is inconsistent with due process.

### *Conclusion*

Rejected; this alternative is rejected because it could be perceived as unfair.

#### **4.5.8.2 Hardship**

##### **Final Action: No hardship cases will be heard during the appeals process**

This action requires fishermen to meet the eligibility requirements described in the sections above to qualify for limited access in either the swordfish or shark fisheries. NMFS believes that given the lenient eligibility time frame, the low landings thresholds, and the fact that this system was previously proposed twice, that this action is fair and reasonable. In addition, allowing hardship cases may be inconsistent with the objectives of limited access as it would allow continued overcapitalization to some extent. In lieu of hearing hardship cases, NMFS has attempted to include exemptions (Section 4.5.9) for common situations heard during the comment periods. Furthermore, NMFS has made these limited access permits transferable with upgrading restrictions.

### *Conclusion*

This action is selected because NMFS believes the lenient eligibility requirements do not justify hearing hardship cases.

#### **Rejected Options for Hardship during an Appeal**

##### **Rejected Option: Hardship cases heard during the appeals process**

During the public hearings conducted for the previously proposed limited access system and in letters to the agency, NMFS received comments that the proposed eligibility and landings time frames and thresholds could result in a significant number of appeals. NMFS also received comments that limited hardship cases should be heard (tragic loss, family emergencies, etc.) and that fishermen should have enough time to gather information after long fishing trips and to conduct thorough reviews. However, NMFS believes that the lenient permit eligibility time frame and low landings thresholds, in addition to several modifications from the previously proposed rules based on public comment, should minimize the volume of appeals and hardship cases. In addition, hardship cases make it extremely difficult to ensure consistency between decisions on the appeals. Appeals officers may vary in their interpretation and/or evaluation of similar cases. By not allowing hardship cases, NMFS can ensure that everyone is treated equally with no extraneous information harming or helping their cases.

## *Conclusion*

This alternative is rejected because NMFS believes that the changes to the limited access system since the previously proposed rules and the relatively lenient permit and landings thresholds should reduce, if not eliminate, the number of possible hardship cases.

### **4.5.9 Exemptions**

NMFS establishes two exemptions to the eligibility criteria in order to be consistent with the overall intent of limited access, to accommodate for the dynamic aspect of these fisheries since NMFS first began rulemaking in mid-1995, and to address the effects of delays in implementation of this limited access system.

The first exemption states that persons who purchased a qualifying vessel *and* that vessel's landings history after December 31, 1997 (this must be stated explicitly in a written agreement), are exempt from the requirement to have owned a vessel issued a valid Federal Atlantic swordfish or shark permit at any time from July 1, 1994, through December 31, 1997. Such persons must have purchased vessels and their associated landings histories that meet the landings eligibility criteria described above, through documented transfer at the time of purchase, and must own a swordfish-permitted vessel at any time during the period June 1, 1998, to November 30, 1998, or a shark-permitted vessel at any time in 1998. This exemption provides a mechanism to account for vessel sales after 1997 and should not result in any increase in the number of current participants. Without such an exemption, qualifying vessels could be eliminated despite legitimate purchases of vessels and their associated landings histories because the current owner did not own a vessel issued a valid Federal Atlantic swordfish or shark permit before December 31, 1997. Such cases will be considered during the application process; thus, fishermen who feel they qualify for a permit under the terms of this exemption must apply within 90 days of the publication of the final rule.

The second exemption applies to those fishermen who first obtained a Federal swordfish or shark permit in 1997. Those fishermen are exempt from the requirement to document a second year of Atlantic swordfish or shark landings as described above. Rather, such fishermen may document, for the directed permit, landings of at least 25 swordfish or 102 sharks during 1997 (equal to the \$5,000 substantially dependent threshold), or, for an incidental permit, landings of at least one Atlantic swordfish or shark during 1997. This exemption provides for persons that first obtained Federal swordfish or shark permits in 1997 and who may have commented on the draft HMS FMP to be eligible for directed or incidental permits, as appropriate. All other eligibility requirements still apply as described in this Chapter. Fishermen who did not automatically receive a limited access permit but feel they meet this exemption must apply. Under this exemption, NMFS estimates that four fishermen are eligible to receive a directed swordfish limited access permit, four fishermen are eligible to receive a directed shark limited access permit, five fishermen are eligible to receive an incidental swordfish limited access permit, and 26 fishermen are eligible to receive an incidental shark limited access permit.

## 4.6 Harvest Limits

During directed swordfish closures previous regulations allow swordfish longline fishermen to land up to 15 swordfish per trip and all other gears, except handgear, to land up to two swordfish per trip until the incidental set aside is filled; handgear users are not allowed to land any Atlantic swordfish during closures. Squid trawl fishermen may land up to five swordfish per trip until the incidental set aside is filled regardless of directed swordfish closures. During an Atlantic shark fishing closure of any species group, shark permit holders may not land any sharks from that species group.

### 4.6.1 Limits for Swordfish Directed Permit Holders During Directed Fishery Closures

**Final Action: Status quo – allow 15 swordfish per vessel per trip for directed swordfish limited access permit holders during a directed fishery closure until the incidental set-aside is filled**

This action will allow directed swordfish limited access permit holders to land 15 swordfish per vessel per trip until the incidental swordfish set aside is filled. The previous proposed rule for swordfish limited access proposed to reduce the longline harvest limit during a directed fishery closure from 15 to five swordfish per trip until the set aside is filled. NMFS received numerous comments that this reduction would eliminate the fresh market niche that U.S. fishermen can maintain under the status quo harvest limit. NMFS establishes this action to minimize economic impacts and allow fishermen to maintain their year-round fresh market niche.

#### *Conclusion*

This action is selected because it is consistent with current regulations, is not expected to increase bycatch (NS 9), and will help fishermen maintain the current year-round U.S. fresh market niche (NS 8).

### **Rejected Options for Harvest Limits for Swordfish Directed Permit Holders During Directed Fishery Closures**

**Rejected Option:** Allow five swordfish per vessel per trip for directed swordfish permit holders until the incidental swordfish set aside is filled during a directed fishery closure

This was NMFS' preferred alternative in the previously proposed swordfish limited access system. NMFS received comments suggesting that this limit may increase bycatch mortality and decrease the value of swordfish as it would reduce the year-round fresh fish market. Due to these comments, NMFS decided to maintain the status quo.

#### *Conclusion*

This alternative is rejected because it might increase bycatch mortality, inconsistent with NS 9, and have negative economic impacts through the loss of the current year-round U.S. fresh market niche (NS 8).

**Rejected Option:** No swordfish for directed swordfish permit holders during a directed fishery closure

This alternative would require directed swordfish permit holders who are fishing for other species during a swordfish closure to discard any swordfish caught. This might increase bycatch mortality and would eliminate the current year-round fresh fish market for domestic fishermen.

### *Conclusion*

This alternative is rejected because it might increase bycatch mortality, inconsistent with NS 9, and have negative economic impacts to fishermen (NS 8).

#### **4.6.2 Limits for Incidental Limited Access Permit Holders**

Without limits on the landings of incidentally caught Atlantic swordfish and sharks, the potential exists for significant numbers of fish to be landed, thereby defeating the purpose of limited access and hindering the rebuilding process. For these reasons, NMFS limits the landings of incidentally caught Atlantic swordfish and sharks by all gears.

**Final Action:** For swordfish incidental limited access permits, allow five swordfish to be landed per trip for squid trawl vessels or two swordfish to be landed per trip for all other gear types. For shark incidental limited access permit holders, allow five large coastal sharks to be landed per vessel per trip for all gear types, and a total of 16 pelagic or small coastal sharks, all species combined, to be landed per vessel per trip for all gear types

The incidental harvest limits for swordfish are based on current regulations. For sharks, these limits represent the average number of sharks caught incidentally (either during a large coastal shark (LCS) closure or caught by pelagic longline fishermen not targeting sharks) per trip in 1996 and 1997. Analyses indicated only a few trips targeting swordfish or tuna caught a number of sharks above the limit in this action. Analyses performed on the pelagic longline logbook indicate that during the 1996 LCS closures over 75 percent of 1,562 trips caught a maximum of one LCS (50 percent of the trips did not report catching any LCS). The mean number of LCS caught during these trips is larger than one because ten percent of the trips caught a maximum of nine to 80 LCS (only one percent of the trips caught 80 LCS). Of the 1,631 trips in 1996 where sharks were not targeted, over 75 percent of the trips caught a maximum of five pelagic sharks (50 percent of the trips did not report catching any pelagic sharks). The mean number of pelagic sharks per trip is larger than five because ten percent of the trips caught a maximum of 25 to 286 pelagic sharks (only one percent of the trips caught 286 pelagic sharks). Analyses performed on 1997 data were similar but indicated

lower means (two LCS and 11 pelagic sharks). In order to comply with NS 9, NMFS decided to use the larger numbers from 1996 for the shark limits.

This action will also aid enforcement because the harvest limits are per trip rather than per day. NMFS believes that these limits are appropriate for those fishermen whose interactions with these species are truly incidental in nature.

#### *Conclusion*

This action is selected because it meets the goal of limited access to rationalize fleet capacity to available quota, and addresses enforcement concerns.

### **Rejected Options for Harvest Limits for Incidental Limited Access Permit Holders**

**Rejected Option:** No limit on fishery harvest for incidental limited access permit holders

Without limits on Atlantic swordfish and shark landings in the incidental fishery, the potential exists for the incidental fishery to target and harvest substantial numbers of fish which could result in the premature closure of the directed fishery. Limiting the directed fishery without a similar limit on the incidental fishery would be inconsistent with the goal of rationalizing fleet capacity to available quota.

#### *Conclusion*

This alternative is rejected because it is not consistent with the goal of limited access to rationalize fleet size given the available quota .

**Rejected Option:** For swordfish incidental limited access permits, allow five swordfish per vessel per trip for squid trawl vessels or two swordfish per vessel per trip for all other gear types. For shark incidental limited access permit holders, allow one large coastal shark per vessel per day for all gear types, and allow a total of three pelagic or small coastal sharks, all species combined, per vessel per day for all gear types

For swordfish, these incidental limits are consistent with current regulations and were the preferred alternatives in the previously proposed limited access rule. For sharks, these limits represent the average number of sharks caught incidentally (either during a large coastal shark closure or caught by pelagic longline fishermen targetting swordfish or tuna, not sharks) per set in 1996 and 1997. Although the analyses for these limits had high standard deviations, the mean number of sharks caught incidentally was consistent for over 75 percent of the sets. In other words, the analyses indicated only a few sets caught numbers of sharks above the limit stated above. This alternative is not selected due to enforcement concerns in calculating per day harvest limits. Also, vessels that fish for extended periods could conceivably harvest substantial numbers of sharks.

#### *Conclusion*

This alternative is rejected because monitoring landings on a daily basis is more difficult than monitoring on a per trip basis.

## **4.7 Transferability of Permits**

### **4.7.1 Transferability Restrictions**

Currently, Atlantic swordfish and shark permits are only valid for the vessel and owner to whom they were issued. However, since there were no eligibility requirements and no limit on the number of permits issued prior to the implementation of limited access, there has been no need to make permits transferable. Since the establishment of control date in these fisheries, some individuals have purchased a vessel having an existing permit before the control date and included the vessel's catch history in the sales agreement.

**Final Action: Limited access permits are transferable with or without the sale of the permitted vessel, or to a replacement vessel owned or purchased by the original permittee (subject to upgrading restrictions - see following section), but not under any other circumstances**

Limited access is a mechanism for freezing the level of fishing capacity until a more comprehensive management system is developed. However, fisheries are dynamic, both in terms of the natural resource and the human component, and NMFS believes it is important to make allowances for inevitable changes, to the extent practicable. Vessels may sink or deteriorate beyond repair, and some vessel owners will exit the fishery. This action allows a reasonable level of transferability to accommodate circumstances such as death or permanent disability of the permittee, or replacement of a damaged, destroyed, or aging vessel, without hindering the objectives of limited access.

NMFS believes that transfers involving the documented purchase of a permitted vessel are acceptable as long as the transfer does not increase the number or capacity of permitted vessels in the fleet. Providing a means to transfer directed and incidental permits with or without the sale of the permitted vessel will allow permittees to permanently retire from the Atlantic swordfish or shark fisheries and sell all assets in that fishery. It will also provide opportunities for new entrants to the fisheries, although these new entrants will likely have to pay the price of the capitalized value of the permit(s) and possibly the vessel.

### *Conclusion*

This action is selected because it will not increase the number or capacity of permitted vessels but will allow for the dynamic nature of these fisheries, consistent with the goals of limited access and NS 6. It also minimizes adverse economic impacts to fishermen, consistent with NS 8.

### **Rejected Options for Transferability of Permits**

**Rejected Option:** Status quo: No transferability of limited access permits

This alternative would prevent owners from selling their permits or transferring their permits to another vessel. Under limited access, this would be the most effective means of reducing the number of permits through attrition, but it would also have adverse economic and social effects. This alternative could be perceived as an unfair penalty against families of individuals who are no longer able to fish. Vessels that are lost or are no longer seaworthy could not be replaced, thus providing an incentive to “stretch” the life of a vessel (inconsistent with NS 10). Also, the value of a vessel offered for sale would likely be diminished if it could not reenter the fishery, particularly if the vessel had limited utility in alternative fisheries. Thus, NMFS rejects the complete prohibition of transfers as unnecessarily inflexible, although it would accomplish the goals of this limited access program.

### *Conclusion*

This alternative is rejected because it is an unnecessarily inflexible means of accomplishing the goals of this limited access program, is inconsistent with NS 10, and may increase bycatch, inconsistent with NS 9.

**Rejected Option:** Require that fishermen submit/purchase two directed limited access permits to qualify to transfer one directed limited access permit

This alternative would require fishermen wishing to enter either the directed swordfish or the directed shark fisheries to purchase two directed limited access permits to obtain one directed limited access permit. Additionally, if the fisherman wishes to enter the directed swordfish fishery, he/she would also have to obtain an incidental shark permit and an Atlantic tuna longline permit (see above). This alternative would reduce harvesting capacity in the fisheries over time as original limited access permittees leave the fishery. This alternative is not selected at this time as it reduces not only latent effort but also active effort. In the long term, NMFS may consider this alternative; however, in this first step towards rationalizing fleet size with the quota, this alternative is not considered appropriate.

### *Conclusion*

This alternative is rejected at this time because it may reduce active effort in addition to latent effort, inconsistent with goals of this proposed limited access system.

## 4.7.2 Upgrading Restrictions

Prior to this FMP and implementing rule, there were no restrictions on upgrading vessels' harvesting capacity. NMFS believes that this issue is a critical component of any plan to address overcapitalization and excess fleet capacity.

### **Final Action: Adopt NEFMC and MAFMC upgrading restrictions**

The New England and Mid-Atlantic Fishery Management Councils have adopted limited access policies that make upgrading restrictions consistent across fleets of fisheries. NMFS agrees that consistency with other fishery management plans affecting the same fleets is important. These regulations allow for one vessel upgrade provided the upgrades do not exceed 20 percent of the horsepower (HP), and ten percent of the length overall (LOA), gross registered tonnage (GRT), and net tonnage (NT) of the vessel's baseline. Changes to LOA, GRT, and NT must be performed at the same time; changes in HP may be carried out separately. The vessel baseline dates for vessels without existing baselines would be established on the date of publication of this final rule. These regulations are similar to those alternatives in the previously proposed limited access rules. As such, NMFS believes these restrictions, while allowing for a slight increase in harvesting capacity, provide vessel owners reasonable flexibility in refurbishing an existing vessel or acquiring a replacement vessel with improved safety characteristics.

### *Conclusion*

This action is selected at this time because it may increase harvesting capacity slightly but will promote safety at sea (NS 10) and address consistency issues across fisheries. However, NMFS will continue to collect data and may consider alternate upgrading restrictions, like hold capacity, in the future.

### **Rejected Options for Upgrading Restrictions**

#### **Rejected Option:** No upgrading allowance from originally-permitted vessel

This alternative minimizes a vessel owner's flexibility to enhance the performance of an existing vessel or to replace that vessel. This alternative would not allow any upgrades to existing vessels and would require replacement vessels to meet the same specifications as the original vessel. This alternative might unduly hinder fishermen who are substantially dependent on more than one fishery and might be inconsistent with NS 10 if vessel upgrades could improve safety at sea.

### *Conclusion*

This alternative is rejected because it might unduly hinder fishermen who are substantially dependent on more than one fishery and might be inconsistent with NS 10.

#### **Rejected Option:** No upgrading restrictions

This alternative would maximize a vessel owner's flexibility to enhance the performance of an existing vessel or to replace that vessel. However, unrestricted upgrading in terms of LOA, GRT, hold capacity, and other relevant factors could defeat the purpose of limited access system by significantly increasing fleet harvesting capacity. Individuals who upgraded their vessels substantially could also be disadvantaged in the long term if future fishing shares were to be based on pre-limited access catch histories, or on a formula not involving individual catch histories.

*Conclusion:*

This alternative is rejected because it could significantly increase harvesting capacity, thus defeating the purpose of this limited access system.

#### **4.7.3 Ownership Restrictions**

Currently, the database of permitted vessels indicates that no single person or entity owns more than one percent of Atlantic swordfish or shark permits. However, without restrictions on permit transferability allowed under the limited access system, individual entities could acquire what some might consider to be an excessive percentage of the permits in the swordfish fishery. NMFS believes that ownership restrictions are an effective tool for preserving the historical small owner/operator nature of the fishery.

**Final Action: Restrict the number of Atlantic swordfish or shark permitted vessels that any one person or entity may own or control to no more than five percent of the swordfish or shark permitted vessels in the directed fisheries.**

This action limits the percentage of the total swordfish or shark permitted fleet that any one person or entity may own or control, thus preventing significant consolidation and maintaining the individual owner/operator character of the swordfish and shark fisheries. The actual cap on the number of vessels one entity may own will vary according to the size of the fleets. However, it should be noted that no single entity exceeds the percentage threshold at this time.

*Conclusion*

This action is selected because it will help maintain the small owner/operator nature of these fisheries, consistent with NS 8.

## **Rejected Options for Ownership Restrictions**

### **Rejected Option:** No restrictions on ownership

At present, there are no limits on the number of swordfish-permitted or shark-permitted vessels any one person or entity may own. Under this alternative, consolidation of ownership of swordfish-permitted vessels would be limited only by existing antitrust law. NMFS believes that this alternative would not adequately preserve the historical small owner/operator nature of the fishery.

### *Conclusion*

This alternative is rejected because it would not adequately preserve the historical small owner/operator nature of the fisheries and their associated communities, inconsistent with NS 8.

## **4.8 Environmental Consequences**

There are few potential negative environmental consequences that could result from any of the actions concerning the final limited access system. In fact, there are a number of clear advantages, in terms of resource conservation and economic efficiency, that are associated with implementation of this limited access system. These advantages accrue because there will be fewer incentives for commercial fishermen to subvert the management system. Positive potential environmental consequences relate to the ultimate number of participants and the extent to which the fishery is concentrated within the fishing year. A large number of participants fishing for a relatively small quota is likely to result in the usual problems associated with the “race for the fish.”

For the Atlantic swordfish and shark fisheries, limiting the number of participants through the final actions will likely have little direct environmental consequence. Because catch volume and the average size of landed fish can be limited through annual or seasonal quotas, time and area closures, minimum size restrictions, and other means, with or without access controls, the theoretical direct biological effects of limited access by itself may be minor. However, in situations where there is a serious bycatch problem for undersized fish, gamefish or marine mammals and endangered species, the bycatch problem may be exacerbated by the derby fishing conditions associated with open access. If a reduction in the number of participants alleviates derby fishing conditions, the number of interactions with undersized fish, gamefish of all sizes or protected species could conceivably be lessened due to fishermen having more time to choose fishing grounds and set and retrieve gear carefully. However, since the reduction in latent effort itself is unlikely to significantly reduce the effective fishing effort and since there will still be a competitive fleet-wide quota, the current derby fishing conditions may not be substantially alleviated. The final limited access system will, however, reduce the likelihood that future derby fishing conditions will intensify.

The environmental consequences of the alternatives outlined above are examined below. Since, in general, the environmental consequences are minimal and do not vary substantially between the alternatives considered for each issue, the detailed descriptions of alternatives are not repeated here.

#### **4.8.1 Number of Permit Categories**

Implementing a two-tiered permit system, in itself, will have few environmental consequences. Harvest levels are not directly affected so that the biological environment of fishery resources and the human environment of fishermen will not be affected. Permit application and reporting requirements for fishermen will not change so that net economic benefits will be unchanged and no increase in compliance costs should be incurred.

#### **4.8.2 Limits the Number of Vessels Permitted**

Under open access, quotas can still be controlled, as noted above. However, measures such as commercial quotas can lead to derby fishing conditions under open access, with consequences for bycatch of undersized fish and other protected species. To the extent that derby fishing can lead to lower prices due to market gluts, fishermen may feel the need to compensate for lower prices by producing a higher volume, with further pressure on the targeted and bycatch stocks. Limiting the number of vessels in the directed fishery is the first step towards balancing the available quota with the effort required to harvest it, thereby reducing the likelihood that derby fishing conditions will develop or intensify. Limiting the number of incidental fishery permits will prevent an expansion of fishing effort in fisheries that primarily direct effort on other species but that catch swordfish and sharks incidentally. Preventing increases in fishing mortality from incidental fisheries will contribute to stock rebuilding for swordfish and large coastal sharks and will help prevent overfishing of pelagic and small coastal sharks.

A reduction in derby fishing conditions would benefit the biological environment by allowing more accurate tracking of harvest so that quota over and underharvests will be reduced, as well as potentially increased survival of released bycatch. The physical environment would benefit from less intense derby fishing conditions in that more time can be taken retrieving gear, thereby reducing gear loss and associated “ghost fishing.” The human environment will also benefit if derby conditions are reduced because there would be less pressure to fish during inclement weather, which should improve human safety at sea.

#### **4.8.3 Eligibility to Participate in the Directed and Incidental Fisheries**

Criteria used to determine eligibility to participate in the directed and incidental fisheries, such as holding a current permit over certain periods and meeting landings thresholds for a specified time period, will have few biological consequences on fishery resources because total fishing effort will not be affected directly by the limited access system, as noted above. For the same reasons, reassigning permits as directed or incidental, in itself, will have no direct environmental consequences. If landings criteria are used to determine eligibility, then speculative fishermen may be denied directed permits, which could result in some net economic loss. However, this economic loss should be minimal because speculative permit holders, by definition, have not contributed to the net economic gain in the commercial fisheries.

#### **4.8.4 Appeals Process**

Establishing an appeals process to review documents submitted in support of eligibility criteria to participate in the directed or incidental fisheries will have no environmental consequences because fishing effort, reporting requirements, and compliance costs will not be affected directly. Possible increases in the number of participants in the fisheries due to permits awarded as a result of appeals will have limited environmental consequences because harvest levels are controlled by quotas, commercial retention limits, and time-area closures that are not affected directly by the limited access system. Reduction of derby fishing conditions may lead to lower compliance costs as the incentive for circumventing regulations is diminished.

#### **4.8.5 Transferability Restrictions**

Allowing limited transferability of directed and incidental permits should have few environmental consequences because fishing effort will not be directly affected. Allowing sale of permits with or without the permitted vessel or transfer of permits to vessels of similar harvesting capacity will not affect overall fleet harvesting capacity. Some net economic benefit may be realized by fishermen who exit the fishery if the capitalized cost of the permit is substantial. This will further reduce the incentive to target swordfish or sharks when fishing for other species, although increases in regulatory discards may result from the unavoidable catches of swordfish and sharks that cannot be landed.

#### **4.8.6 Upgrading Restrictions**

Allowing replacement vessels or refurbished vessels a one-time upgrade of no more than 20 percent of the horsepower and ten percent of the vessel length, gross registered tonnage, or net tonnage will allow minor increases in fleet capacity. Environmental consequences will be insignificant because harvest levels, reporting costs, and compliance costs will not be directly affected.

#### **4.8.7 Ownership Restrictions**

Restricting the number of swordfish- and shark-permitted vessels in the directed fisheries that any one person or entity can own or control to no more than five percent of the directed fleet will have few environmental consequences because overall fishing effort, reporting costs, and compliance costs will not be directly affected.

#### **4.8.8 Harvest Limits**

Implementing incidental harvest limits could lead to some net economic loss if some fishermen exit the fishery because they cannot retain all of their swordfish or shark incidental catch. However, reduced incidental landings should contribute to increased rates of stock rebuilding or decreased likelihood of overfishing. Some net economic loss may occur because the alternative methods for reducing swordfish and shark incidental catches may reduce catches of target species, although any reduction in catches are expected to be minimal. Compliance costs may increase slightly in that enforcement agents will need to check the type of commercial permit held.

#### **4.8.9 Impacts on Marine Mammal and Endangered Species**

Marine mammals and sea turtles are known to be taken in the drift gillnet and longline sectors of the Atlantic shark fishery. Under the Marine Mammal Authorization Program, the southeast shark drift gillnet fishery is a Category II fishery (occasional take), the shark bottom longline fishery is a Category III fishery (no known take), and the Atlantic swordfish longline fishery is a Category I fisheries (frequent incidental take).

No impacts on marine mammals and endangered species are expected to result from the final limited access measures. However, this FMP cumulatively has significant changes in the Atlantic swordfish and shark fisheries, in terms of quota levels, fishery operation, and potentially bycatch and bycatch mortality rates. To that end, NMFS reinitiated consultation on this FMP. The overall impact on protected species depends on the extent to which changes in fishing effort in the swordfish and shark fisheries would result in effort changes in other fisheries and the relative take rates in those fisheries. For example, reductions in allowable catches in the shark fishery may result in a shifting of effort to other fisheries that may have higher take rates.

#### **4.8.10 Mitigating Measures**

No significant environmental impacts are expected to result from the final limited access measures; therefore, no mitigating measures for the limited access measures are included. For discussion of the cumulative environmental impacts in the final FMP, see Chapter 8.

#### **4.8.11 Unavoidable Adverse Impacts**

The unavoidable adverse impact of this limited access system is that it will transform a fishery that was previously open to all U.S. residents into one that will be restricted to those permit holders who can demonstrate at least a threshold level of historical landings. This adverse impact is unavoidable because of the mismatch that has been created by escalating fleet capacity combined with a dwindling resource. If this action is not taken, and new fishermen continue to enter the fishery, it is highly likely that many businesses will suffer severe economic hardship in the future (see Chapter 7). If this action is not taken, it is also likely that effective fishing pressure on the resource will increase, thus leading to further declines in net benefits as the fishing season collapses and the “race for the fish” intensifies. To mitigate this impact, NMFS is allowing the transferability of permits. This will allow fishermen willing to leave the fishery to sell their permit, with or without the vessel, to fishermen willing to enter the fishery. In an open access system where fleet capacity has met or exceeded that needed to harvest the surplus production from the resource (as is the case for swordfish and sharks), individuals compete to catch as many fish as possible as quickly as possible, often resulting in poor fishing practices such as hasty deployment and retrieval of gear that may result in many fish being killed but not landed, and selection of fishing grounds for proximity to land or high catch rates of target species without regard for bycatch of other species or undersized individuals.

#### **4.8.12 Irreversible and Irrecoverable Commitment of Resources**

No irreversible or irretrievable commitments of resources are expected.

#### References Cited in Chapter 4

- Appendix A to the Amendment 8 to the Reef Fish Fishery Management Plan, Gulf of Mexico Fishery Management Council, Tampa, Florida.
- Branstetter, S. and G. Burgess. 1997. Gulf and South Atlantic Fishery Development Foundation and University of Florida. Commercial Shark Fishery Observer Program 1996. 1996 SEW Document SB-III-1 and 1998 SEW Document SB-IV-1.
- Larkin, Sherry L., Donna J. Lee, Charles M. Adams. 1998. Costs, Earnings, and Returns to the U.S. Atlantic Pelagic Longline Fleet in 1996. Institute of Food and Agricultural Sciences. University of Florida. Staff Paper SP 98-9. Gainesville, FL. 46 p.
- Magnuson-Stevens Act (16 U.S.C. 1801, § 2)
- Muse, B. 1991. Survey of Individual Quota Programs. Draft report. Alaska Commercial Fisheries Entry Commission. June. 32 p.
- NMFS. 1992. Regulatory Impact Review for the Bluefin Tuna Fishery. NOAA. U.S. Department of Commerce.
- NMFS. 1995. Options for Establishing an Interim Permit Moratorium and Eligibility Criteria for the Atlantic Swordfish (or Shark) Fishery. NOAA. U.S. Department of Commerce. 20 p.